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ABSTRACT

The handbook details legal options in providing for decisionmaking regarding mentally retarded persons. Defined are trusts and representative payee situations. Considered in detail are aspects of guardianship and conservatorship, including legal standards, effects on daily living, financial issues, and liability. A final section provides technical information on guardianship, specifically as it relates to Massachusetts state law. (CI)

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A HANDBOOK ON GUARDIANSHIP, CONSERVATORSHIP AND OTHER OPTIONS

PART I: THIS HANDBOOK IN A NUTSHELL

PART II: THE OPTIONS IN MORE DETAIL

A. TRUSTS

B. REPRESENTATIVE PAYEE

C. GUARDIANSHIP AND CONSERVATORSHIP

PART III: MORE TECHNICAL INFORMATION ON GUARDIANSHIP

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TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) AND USERS OF THE ERIC SYSTEM."

EC112615

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This handbook is the result of many hours' work by many people, most especially those numerous callers--patients, parents, social workers--whose individual stories and desperate questions pointed to the need and the content.

Thanks go to the staff of the Massachusetts Association for Retarded Citizens, in particular Mary Lou Maloney, Jeanette Gorman, and Sharon Moriarty, for assistance in writing, editing and distributing; to Ray Bilodeau, Don Freedman, Richard Magri, and Arthur Rosenberg, attorneys who read and commented on the first drafts; to Harry Robertson, Kathleen Corbett, and Robert Raciti, who as law students with the Mental Health Legal Advisors did much of the initial research; and to William O'Neil, MHLAC executive director, for so ably and patiently translating for me the intricacies of Massachusetts probate law. Responsibility for any errors, however, remains with the authors.

Additional copies of this handbook are available from MARC or MHLAC for a suggested donation of $1.00; the handbook will then be sent postage pre-paid. Copies will be provided without charge at our discretion to those who are legally or financially unable to provide the suggested donation.

Hopefully this handbook will help protect the rights both of those who need guardianship and those who do not.

Nancy Rich
Mental Health Legal Advisors Committee

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PART I:
THIS HANDBOOK IN A NUTSHELL

The right to make important life decisions, and the right to not be under the control of another individual--so basic to the idea of adulthood and citizenship--should be jealously guarded, for mentally ill and mentally retarded people as well as other members of our society. Clearly in some cases a person may be so severely handicapped that substantial harm will result unless someone takes over decisionmaking in one or more areas of life. Even then, unless there is someone who will assist loyally and intelligently in the ways described in this handbook, none of us should intrude into the disabled person's life. All of the legal options below have very serious and often irreversible effects, and should not be used unless the informal options are completely inadequate.

FIRST. Consider whether the mentally disabled person can get by with advice from family or friends.

Along these lines, consider whether he or she is likely to listen to advice and follow it, and whether the advice is likely to be sound.

SECOND. Consider the possibility of teaching the mentally disabled person to make better decisions.

There are now many programs for mentally disabled individuals in areas such as money management skills; sex education; independent living skills. Good counseling on particular decisions may also help. For information on particular programs, see the resource list, page 34 of this handbook.

THIRD. For financial decisions, consider special bank accounts which can help with budgeting and money management.

For example, joint bank accounts can be set up which require two signatures for withdrawal, thus preventing rash expenditures. Benefits checks, such as Social Security or SSI, can be sent directly from the issuing agency to the bank for deposit to prevent loss. Arrangements can be made with most banks for a "permanent withdrawal order", which means a certain amount of money will be sent by the bank each month to a specified party--for example, to the landlord, or to the mentally disabled person for pocket money. The mentally disabled person would still technically have access to all remaining money in the account as well, but these procedures may provide enough structure to help with budgeting and money management.

FOURTH. For mentally disabled persons whose parents (or anyone else) want to leave them a substantial amount of money consider setting up a trust.

A trust is a legal plan for placing a source of funds in the control of a trustee for the benefit of an individual. The source of funds would typically be a family's assets. The trustee may be an individual or an organization such as a bank. The person setting up the trust can spell out in detail how the assets are to be used (for education, for recreation, etc.). Trusts should be set up with the help of a lawyer. For more details, see page 5 of this handbook.

FIFTH. For mentally disabled persons receiving benefits checks from social security, SSI, Veterans' pensions, and so on, consider obtaining a representative payee to manage these checks.

If the mentally disabled person is not capable of managing this type of income properly, the office issuing the checks can appoint a more capable person as representative payee. The checks would be sent to the representative payee, who would sign them and use them for thebenefit of the mentally disabled person. The representative payee has authority only over income from the particular checks for which he/she is payee. The payee could not, for example, control the mentally disabled person's land, house, or other property, or even bank accounts from sources other than the benefits checks. The mentally disabled person would still make all the personal decisions. The payee is responsible for using the money to meet basic needs of the mentally disabled person for food, clothing, shelter, and personal needs. The second priority is to see to school expenses, rehabilitation and medical expenses, and other special needs. Representative payees are appointed by the office issuing the checks; for more information call the local Social Security Office or Veterans' Administration office. Also see page 6 of this handbook.

SIXTH. For mentally disabled persons who are too disabled to manage financial decisions and who have assets from sources other than benefits checks, consider conservatorship.

A conservator is appointed by a court to handle financial decisions only (not personal decisions). The court requires evidence of the individual's incompetence to handle financial maters--for example, being so mentally retarded as to be incapable of absorbing the basic information on which to base a decision; or so mentally ill as to base serious decisions on delusions. For mentally retarded people, the court also requires evidence of some <u>risk</u> to their property if a conservator is not appointed. A certain amount of money can be exempted from the conservatorship and left to the mentally disabled individual to handle, if the court approves.

SEVENTH. For mentally disabled persons who are incapable of making decisions about both personal and financial affairs, guardianship might be considered.

Guardians are appointed only by the court, and the court requires evidence of incompetence to handle both personal and financial affairs. For mentally retarded individuals the court also requires evidence of some risk to their health, welfare or property if a guardian is not appointed, and evidence that a conservatorship would not eliminate this risk.

As with conservatorship, the individual would have to be mentally ill or mentally retarded to the extent of basing serious decisions on delusions or being incapable of absorbing the basic information on which to base a decision, or some other equally serious extent.

Guardianships can be total--where the person loses the right to make decisions in any and all matters. Guardianships may also be limited (if the judge is willing) to certain areas, for example, medical decisions, leaving the mentally disabled individual to continuing making his/her own decisions in all other areas. The court can also be asked to let the mentally disabled individual continue handling a portion of his/her income without the guardian's help.

* * * *

Guardianship is the most serious and drastic of all the options and should only be used when nothing else will work. If obtained when unnecessary, guardianship can do more harm than good by undermining the self-confidence of the mentally disabled person trying to learn to manage his or her own life. Great hardship can be caused by a guardian who does not care or who has a conflict of interest with the mentally disabled person--for example, a husband getting guardianship over a wife in order to get her out of the house; a parent using guardianship to keep a child unnecessarily in an institution to save family embarrassment over the neighbors seeing the disabled child. Guardianship can be expensive and time-consuming to obtain, since it can only be done through a court process which usually requires a lawyer. Guardianship will not solve the problems created by inadequate services, bureaucratic red tape, and a society that often deals harshly with mentally disabled people. Guardianship takes away many rights, including the right to vote; to manage money; and to make decisions about medical care, education, place of residence, and all other areas of life. It is a very serious step.

In those cases where guardianship is really needed because no other option will provide adequate decisionmaking power, and because the individual is too disabled to make informed decisions, then the benefits can include: someone to sign consent forms, such as for educational plans or surgery; someone to make important decisions; someone to manage the finances. Guardianship can be a helpful and positive thing in these situations.

In borderline cases, it is important to weigh the positives and negatives carefully, and in particular to remember that guardianship is hard to reverse and requires the consent of the court to change.

With the exception of conservatorship, the other options mentioned above are much easier to start, change, and reverse as the individual's needs change.

In all of these options, nothing can substitute for a strong advocate on behalf of the mentally disabled person.

PART II:
THE OPTIONS IN MORE DETAIL

A. TRUSTS

A trust is a legal plan for placing a source of funds in the control of a trustee for the benefit of an individual. The individual may or may not be capable of handling the funds alone.

The source of funds is typically a family's assets. The trustee may be an individual or an organization such as a bank.

The trust provides a financial plan, which the parents can spell out in detail, as they would not be able to do with a guardianship. If a suitable trustee is chosen, the trust also provides a good advocate who monitors the individual's civil and legal rights as much as guardianship does, and a trustee can initiate steps for guardianship later if it becomes necessary. A trust is essentially a financial plan with a built-in advocate.

Trusts should definitely be set up with the help of a lawyer experienced in wills and trusts, and preferably also familiar with mental disabilities laws relating to government disability benefits and to institutional care. Knowledge of these laws is important for two main reasons:

1) With certain exceptions, state institutions may charge a person for institutional care if the person's assets exceed a certain amount. This might mean, for example, that serious consideration should be given to how and whether assets should be conveyed to the disabled person.

2) Eligibility for certain public assistance programs, particularly Supplemental Security Income (SSI), is based on amount of income. A trust set up without regard to these eligibility laws may end up disqualifying a disabled person from SSI, which in many cases is <u>the</u> most important financial security the person could have.

B. REPRESENTATIVE PAYEE

1. What is a representative payee?

A representative payee is a person or organization authorized to cash and manage public assistance checks (SSI, Social Security, Veterans) for a person deemed incapable of doing so.

The representative payee has authority only over income from the particular source for which he/she is payee. The payee for SSI checks could not, for example, control a beneficiary's bank account if it is from sources other than SSI, and could only control those SSI funds which were received after he/she became payee. A representative payee could not make financial decisions about land, house or other property. This means the payee has somewhat more restricted powers than a conservator.

2. What are the responsibilities of representative payees?

The payee is first responsible for meeting the basic needs of the beneficiary, including food, clothing, shelter, and personal needs such as pocket money if the beneficiary is able to handle it. The second priority is to see to school expenses, rehabilitation and medical expenses, and other special needs.

3. How is a representative payee selected?

An applicant for representative payee fills out certain forms obtained from the local Social Sercurity office. Preference is given to:

First, a legal guardian; or relative who has custody or shows strong interest in the person's welfare;
Second, a friend who has custody or shows strong interest;
Third, the superintendent of a public or non-profit agency or institution having custody;
Fourth, a private, profit-making institution having custody, if licensed under state law.

The local social Security office has sole authority to decide whether a representative payee whould be appointed and who it should be. The only exceptions are drug addicts, alcoholics, and persons deemed incompetent by a probate court, for whom representative payees are mandatory.

Usually the decision is made without any notice to the disabled individual, or any opportunity for hearing. This is one reason why some representative payees appear to be less than suitable for the role; there is very little investigation, if any, of actual need for representative payee, or suitability of the applicant.

4. How does one object to a representative payee?

One can appeal the decision afterwards--either the decision to appoint a representative payee or the particular person selected. While the process may be slow, it can be done. For details, contact the local Social Security Administration office, listed in the phone book under "United States Government".

If a payee appears to be misusing funds (keeping them for himself or herself) or is not responding to legitimate requests for funds, one may contact the local Social Security Administration office to request a change in payee.

For indigent residents in mental health facilities, one may also call the Mental Health Legal Advisors Committee (723-2876) for assistance with representative payees not performing their duties properly.

5. What should the representative payee do, step by step?

After the paperwork has been completed at the Social Security office, the payee should contact the beneficiary or his/her caretakers and find out his/her needs. The checks will be sent to the payee, who will endorse and deposit them in a special account for the beneficiary (separate from the payee's own personal account). The payee will then make payments as needed for the beneficiary. Expenditures should be made according to the priorities in Question 2 above.

6. Where can one get more information about SSI and Social Security benefits?

Call the local Social Security office.

C. GUARDIANSHIP AND CONSERVATORSHIP

1. What is guardianship?

Guardianship is the broadest and most restrictive form of decision-making help. A guardian is a person appointed by a court to handle both the personal and financial affairs of another person, the "ward", who, due to mental retardation, mental illness, being a minor or certain other conditions, is incapable of handling his or her own affairs.*

2. What is conservatorship?

Conservatorship is not as broad a form of help. A conservator handles only the financial affairs, leaving the ward to continue making his or her own personal decisions.

In Massachusetts everyone 18 years or older is legally considered to be on his or her own. Parents are no longer the natural guardians and do not have any official decisionmaking authority for a child over the age of 18 unless they go to court and become guardians or conservators.

3. When is guardianship appropriate?

Guardianship should only be for people with very serious problems of judgment or intellectual capacity due to mental illness or mental retardation. Many mentally retarded and mentally ill people would not fall into this category and should not be put under guardianship.

Guardianship should only be sought when impaired judgment and capacity pose a major threat to the person's welfare and prevent understanding of basic information necessary for decision-making. Guardianship is not intended to protect the person from normal daily risks we all face in working, having a residence, moving about, being consumers, relating with other people. Nor should a guardian be appointed simply because the person is about to make decisions showing poor judgment or decisions harmful to him/herself; or has trouble sticking to a decision; or relies heavily on other people for advice. Otherwise, all of us would find ourselves under guardianship for a good part of our lives.

What constitutes a "major threat" to the person's welfare is impossible to define precisely. For people in institutions one of the more frequent risk situations is a need for medical treatment when the person is inacapable of signing the necessary consent form.*

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* This handbook deals with guardianships only for mentally ill and mentally retarded people. For guardianship of a minor, contact a lawyer for more information.

A major consideration should be the environment the person is in--how protected it is; how complex the decisions are that need to be made; how much support the person can get from friends, family, staff in decision-making; and whether the person will accept advice and help. The decision on guardianship should not be made in a vacuum.

4. When is conservatorship appropriate?

Less broad than guardianship, conservatorship can be helpful for a person who is capable of making decisions about personal affairs but cannot handle money decisions. Conservatorship in the past has been used mostly for people with large estates, but can be just as appropriate for people with small estates who cannot handle their finances.

For people whose assets consist only of benefits checks such as Social Security, SSI, or Veteran's benefits, and who need help managing this income, a representative payee may be adequate help (see page 6).

Conservatorship should only be used for people whose judgment or intellectual capacity is so very seriously impaired that they base serious financial decisions on delusions or cannot absorb the basic information needed for decisionmaking. We all make (and are entitled to make) mistakes. Many mentally disabled people are quite capable of adequately handling their own financial affairs, either alone or with informal help, and should not be put under guardianship or conservatorship.

5. What legal standards must be met to obtain guardianship?

To appoint a guardian for a mentally ill person, the court must find that the person is "incapable of taking care of himself due to mental illness". (Mass. General Laws, Chapter 201, Section 6.)

To appoint a guardian for a mentally retarded person, the court must find that:

(1) The person is so disabled by mental retardation as to be incapable of making informed decisions about personal and financial affairs;

(2) Failure to appoint a guardian would create an unreasonable risk to the person's health, welfare and property; AND

(3) Appointing someone with more limited powers (namely, a conservator authorized to handle financial affairs only) would not be adequate. (Mass. General Laws, Chapter 201, Section 6A)

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* Consent is usually required for all non-emergency surgery and treatment. In life-threatening emergencies, doctors can give treatment without consent.

The first requirement may be thought of as a clinical standard that the doctor and psychologist will primarily be responsible for, since they are skilled in evaluating behavior. The second requirement is more of a "social work" decision in that the extent of risk depends on the individual's social context--where he lives (home, institution, by himself, etc.), who is available to help him with decisions and advocate for him, what his medical needs are, etc. The third requirement introduces the very important idea of evaluating whether any less restrictive alternative is possible--conservatorship, representative payee, citizen advocate, etc.

Ultimately, a judge decides whether these legal standards are met. The law does not define these standards more precisely; however, one might consider whether the person can do some (not necessarily all) of the following:

--Understand in simple terms the basic facts and implications of a decision--for example, that a medical operation might entail certain risks and discomforts but still be desirable;

--Generally take care of himself or herself in the sense of recognizing potentially harmful situations and doing something about them or getting other people to help--for example, smelling smoke, being hungry or sick;

--Understand the basic laws of the community; and

--Demonstrate or learn enough basic living skills to live in a group residence or own home if such were available.

The person does not necessarily have to be able to read or write, or even talk, as long as he or she can communicate needs and preferences in some effective way. Supporting oneself financially is not required.

Potential for improvement as well as present ability should be considered. Guardianships (especially for mentally retarded people) are very hard to remove on grounds of improvement, so guardianship should probably not be sought for someone likely to outgrow the need soon.

Guardianship should not be sought if a less restrictive option might work just as well.

6. What legal standards must be met to obtain conservatorship?

For a person of "advanced age" or "mental weakness", a conservator may be appointed if the court finds that the person is "unable to properly care for his property". * (Mass. General Laws, Chapter 201, Section 16)

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* Physical incapacity may also be used as a reason for appointing a conservator, provided the person himself or herself requests or agrees to the appointment.

For a mentally retarded person, the court must find that (1) the person "is incapable of making informed decisions with respect to the conduct of his financial affairs" and (2) "failure to appoint a conservator would create an unreasonable risk to the person's property." (Mass. General Laws, Chapter 201, Section 16B)

Here the question of "risk" is crucial; without some indication of risk a conservator cannot be appointed.

7. How does guardianship affect the daily life of the mentally disabled individual?

Under guardianship the individual gains certain protections and loses certain rights. Whether the net effect is positive or negative depends largely on the performance of the guardian and whether the individual really needed guardianship in the first place.

Unless the guardianship has been limited in specific ways by the court, the guardian will take over management of both personal and financial affairs, including education, food and shelter, medical care, welfare aid, legal assistance, debts and expenditures, etc.

This means that the individual loses many civil and legal rights, such as to vote, to make contracts, to choose a place of residence or type of treatment program or educational program, to make major expenditures*, to travel at will, to sign benefits checks, to decide whether to accept or refuse medical treatments. Guardianship does not, however, automatically prevent a ward from marrying or making a will.

The ward loses the right to manage any property and assets, although he/she is still the "owner". The property and assets must be used for the ward's benefit. For details on finances, see Question 11 below.

Guardianship does not guarantee access to medical or social services, although it lessens one cause of exclusion--the apparent inability of some mentally handicapped persons to give informed consent to treatment. Having a guardian does not make the individual eligible or ineligible for any services;** nor does it necessarily have any effect on the legal power of public or private agencies to make decisions regarding the discharge or transfer of an individual.

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* Sometimes the court will allow the person to keep a certain amount of money each month to spend as desired, while the guardian controls the rest of the income and assets.

** Exception: sterilization decisions should and probably can not be made by a guardian. See page 24 below, Question 36.

Certain decisions have been ruled too personal or too serious for a guardian to make. In Massachusetts, sterilization, for example, probably cannot be authorized by a guardian or even by a court*. Other decisions may possibly be made by a guardian, but only with the court's approval, such as participation in hazardous research projects, abortion, withholding life-saving medical treatment or instituting heroic life-saving measures. Thus a guardian does not get as much power as might first appear, even though the ward does lose many rights.

Decisions on admitting a ward to an institution can no longer be made by the guardian alone. According to a 1977 state law**, there must be a special court hearing on the issue, with the ward present and represented by a lawyer (paid for by the court if the ward has no money). Only if the court approves can the guardian sign the ward into a mental health or retardation institution.

Exception: in emergencies, admission can be authorized by the court for a very short period of time without the patient having an opportunity to be heard.

In general, the effect of guardianship on the ward's life can be minimized by limiting the guardianship (if appropriate and if the court approves) to those areas where the ward really needs the help (see Question 17 on page 18).

8. How does conservatorship affect the daily life of the mentally disabled individual?

Under conservatorship (and guardianship too) the person loses the right to sign checks, get or use credit cards, buy or sell or mortgage property, sign a lease, sign a contract involving money, make investments, or make major expenditures--except with the express permission of the conservator or the court, or except in the case of purchasing necessities such as food if not provided by the conservator.

Property, bank accounts, paychecks, Social Security checks, stocks and bonds and so forth all still "belong" to the ward, although they are managed by the conservator (or guardian). (These items would be put in the name of "Joseph Crowe, Conservator of the Property of Jack Robbin.")

The conservator (or guardian) would become responsible for paying the ward's bills and debts out of the ward's funds, and managing the ward's assets in such a way as to maximize the benefit to the ward.

The court may allow the ward to keep up to $300 per month of income from paychecks, Social Security checks or the like, or other cash assets, to spend as desired. This permission should be requested whenever reasonable, as it can be an important way for the person to learn how to manage money for daily affairs and eventually reach some degree of independence. Usually this exemption has been granted for mentally retarded people, but could be requested for mentally ill people as well.

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* See Question 36, below, for details on sterilization.

** Chapter 567 of the Acts of 1977, amending Mass. General Laws, Chapter 201.

9. What are the guardian's responsibilities?

The guardian's role is similar to that of parent in keeping informed about the ward's needs and making decisions regarding those needs. Unlike a parent, however, the guardian does not have to use his or her own money for the ward's expenses, and does not have to provide daily supervision of the ward or be living with the ward.

The guardian is responsible for making decisions in the best interest of the ward. This is somewhat different from the role of a parent who must be concerned about the best interest of other members of the family as well. The convenience of the guardian or the welfare of future heirs should not be factors in the guardian's actions.

The guardian should keep informed of the ward's needs by visiting him or her and consulting with any caretakers. Just as a parent would, when a major decision or problem comes up, the guardian would gather information about the situation, the different options, risks and consequences, and use his/her best judgment to determine the best course of action for the ward.

The responsibility, though it may be great, is no more than the responsibility of a parent for a child. Guardians are not expected to be medical or psychiatric experts, but rather reasonably responsible and intelligent adults, acting as if facing the same decision for themselves or their children.

For a highly unusual decision which the average adult would have trouble making for himself or his own child, the guardian may and probably should ask the court for instructions (for example, on a choice between a very painful, high risk treatment for a severe illness and a slightly more rapid but painless death without treatment.) Again, certain very personal and serious decisions such as participation in hazardous research experiments should be made by the court, not by the guardian alone. The guardian may find initially that courts are reluctant to get involved in this, but it is the court's duty and the guardian's right.

While the guardian should involve the ward as much as possible to find out needs and preferences, the guardian should make the final choices, because he/she will be responsible for them.

More specifically, unless the guardian's powers have been limited by the court, the guardian would be responsible for:

(1) Seeing to basic needs such as food, shelter, clothing, education. If the ward lives with the guardian, the responsibilities here would be quite detailed.

If the ward lives in an institution or community residence, however, the guardian's responsibilities could be limited to periodic inquiries as to clothing or incidental needs, participation in the institution's periodic reviews of the ward, decisions on educational plans (e.g., Chapter 766, the special education law), periodic inquiry as to treatment plan and the ward's progress, and so on;

(2) Seeing to the ward's medical needs, authorizing or vetoing any non-emergency medical care including surgery, tests, routine medications for treatment of mental illness, shock treatments, psychosurgery;

(3) Participating in decisions about institutional admission, discharge, transfer. The guardian must be notified of these actions, but does not necessarily have total control over these decisions and cannot legally block any action which would have a more beneficial effect on the ward than the alternative choice.

A new state law says that guardians must get permission from the court before admitting a ward to an institution; there must be a court hearing on the issue and the ward must be represented by a lawyer (paid by the court if the ward has no money). Exception: in emergencies admission can be authorized by the court for a very short period of time without the patient having an opportunity to be heard.

(4) Standing in the place of the ward in any legal cases;

(5) Settling the ward's accounts and debts using the ward's funds (see Question 11 for details);

(6) Managing the ward's money and property as frugally as possible and using it for support and maintenance of the ward*; signing any benefits checks (see Question 11 below for details);

(7) Applying for any benefits (SSI, veterans, medicaid, etc.) to which the ward may be entitled; and

(8) From time to time, re-evaluating the need for guardianship and going back to court to remove or limit it if no longer needed.

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* Occasionally a portion of the ward's estate may be used for needy family members, if the ward's needs are already being met well. But the guardian should be very cautious about doing this and seek court approval.

10. What is the role of conservator?

The conservator handles the ward's financial affairs in the ward's best interest. The conservator shares the responsibility for the ward's life with the ward. The conservator handles financial matters, and the ward handles personal decisions. For example, if the ward wants to make an expenditure for something (such as a stereo) the conservator's responsibility is to see if funds permit an expenditure in that category (luxury items) and if the price is reasonable, but not to decide if one item within that category would be better than another similarly priced item (such as a television instead of a stereo). As another example, in choosing a place to live (a personal decision) the ward will ultimately need the conservator's approval for billpaying (a financial matter). The conservator's role would be to decide how much can be spent for housing; the ward would then decide whether to put this amount into a halfway house or an apartment or a nursing home.

An important principle, which holds for guardians too, is to manage the ward's estate for the benefit of the ward rather than for the sake of future heirs or the conservator's own convenience. In some cases the ward's estate, if large enough, can be partially used for support and maintenance of needy dependent children, spouse, or parents; the first beneficiary, however, should be the ward--not the family.

11. What are the responsibilities of the guardian or conservator in the ward's finances?

The ward's finances should be handled in the best interests of the ward. Certain decisions are considered too serious for the conservator or guardian to make without special court authorization: selling real estate, making substantial gifts, disposing of assets for tax purposes, etc. A lawyer or financial advisor (paid out of the ward's funds) should be consulted on those matters.

The conservator or guardian, in addition to making financial decisions, is responsible for initiating or responding to any legal actions concerning debts owed to or by the ward. Again, a lawyer should be consulted and may be paid out of the ward's funds. If the ward is indigent, call the Mental Health Legal Advisors Committee (723-2876).

If the ward's estate is fairly large a lawyer or financial advisor, paid out of the ward's estate, should be hired. But for estates consisting primarily of a small bank account and a monthly incoming check, the conservator probably can learn to handle the role alone fairly easily and quite competently.

The guardian or conservator should:

(1) Upon appointment, get certified or attested copies of the court order from the court, for each place the guardian will be dealing with regularly.

(2) Take an inventory of the ward's estate, including bank accounts; real estate or other property, sources of income, etc. If the ward is in an institution, the staff can probably help with this.

(3) Change any bank accounts over to "fiduciary accounts" (for example, in the name of "John Smith, conservator of the property of Rebecca Pocahontas"). The ward's money should always be kept separate from that of the guardian or conservator.

(4) Notify any agency sending benefits checks (e.g. Social Security, SSI, etc.) to send them to the guardian or conservator.

(5) If the ward has credit cards take possession of them to prevent misuse. Notify any creditors.

(6) Settle any debts owed by or to the ward. A lawyer may be hired out of the ward's funds if legal action is required--for example, if debts exceed assets and a declaration of bankruptcy is needed to wipe the slate clean.

(7) Find out the ward's current, day-to-day financial needs as well as long-term needs, by talking to the ward and his/her caretakers. First priority for expenditures should go to necessities such as food, shelter, clothing, education, medical treatment. If the ward is not living with the guardian or conservator, very definite and clear arrangements should be made with the caretakers as to when and how the regularly occurring expenses will be paid and how the guardian or conservator will be notified of unusual needs. The caretakers should know how to reach the guardian/conservator (or a substitute) at all times, including vacations.

(8) If the ward has extra funds, see to any special items; otherwise, the funds should probably be put in a savings account, or if a substantial amount, invested with the help of a lawyer or financial advisor.

(9) If the ward has dependent children, wife, or parents, for whom the ward's financial support is essential, the guardian or conservator may allot some of the ward's money for their support. The ward's needs however, should come first and the guardian should seek court approval first.

(10) Once a year file a report with the local Probate Court accounting for the ward's funds that year. This report protects both the ward and the guardian/conservator. The court has report forms.

(11) Re-evaluate the ward's ability to handle his/her finances. In order to act in the best interests of the ward, the guardian should be encouraging independence wherever appropriate, including in the management of money. When it appears that the ward can handle more money than the decree allows, the guardian/conservator should go back to court and get the decree revised to reflect that.

All financial decisions should be made "frugally" and without waste", taking care to see if an expenditure is reasonable in view of the goods and services it buys.

These guidelines are quite general, and should not be taken as the final word on every individual situation. For an estate any more complicated than a small bank account and a monthly disability check, a lawyer should be consulted, at least in the beginning. However, for most residents in state institutions, the guardian should be able to give competent and legally sufficient services by following these guidelines.

12. Who can become a guardian or conservator?

Anyone over 18 whom the court feels will act in the ward's best interest--one or both parents or another relative, a friend, a lawyer (often utilized when the ward has a large estate), or certain nonprofit corporations. Parents do not have automatic priority over any other person as guardian or conservator because of the potential conflict of interest.

13. How does one obtain guardianship or conservatorship?

Basically, one or both parents, two or more relatives or friends, certain non-profit corporations, or any agency within the Executive Office of Human Services (includes the Department of Mental Health) can file a petition in the local Probate Court asking to have a guardian or conservator appointed. A person willing to become the guardian or conservator should be available when the petition is filed; otherwise the petition might not be heard. The person who files the petition may be the same person as the guardian or conservator but does not have to be.

The next step is to obtain documentation from medical experts about the person's inability to handle his or her own affairs.

(1) For mentally ill people: a physician's statement as to inability to take care of oneself or one's finances should be obtained. The physician must have examined the person within 30 days of filing the petition.

(2) For mentally retarded people: a "clinical team report" must by law be obtained from a physician, a social worker and a licensed psychologist, all familiar with mental retardation, stating they have examined the person and feel he/she needs a guardian or conservator. The examinations must take place within 180 days of going into court. The statements must be on the proper court forms.

Certain other papers must be filed in the court, and notices must be given to the mentally disabled person and nearest relative about the petition so they have a chance to object. A hearing is held at which the judge hears arguments in favor (and against, if anyone objects), and then either approves or rejects the guardianship or conservatorship. Exception: in emergencies guardianships can be authorized for a very short period of time without the ward having an opportunity to be heard.

14. Does one need a lawyer to get guardianship or conservatorship?

A lawyer experienced in mental health law is strongly recommended, especially if money or property is involved.

If the potential ward cannot afford a private lawyer, and is in a Department of Mental Health facility, contact the Legal Office at the Department of Mental Health (727-8611) for legal assistance, or the Mental Health Legal Advisors Committee (723-2876).

15. How long does it take to get guardianship or conservatorship?

Permanent guardianships and conservatorships take roughly 4-6 weeks, longer if contested. In an emergency, temporary guardianship or conservatorship may be obtained in a matter of hours or days.

16. What is temporary guardianship and when is it appropriate?

Temporary guardianships usually last only up to 90 days, whereas a permanent guardianship does not have an expiration date. A temporary guardianship may be appropriate when a crisis such as acute illness calls for a guardian's decision right away. The usual time periods for giving notice to the potential ward and nearest relative about the impending guardianship are drastically reduced or eliminated altogether. This means that the ward and/or relative have a harder time objecting to the guardianship, although they eventually get an opportunity. For this reason, a judge is likely to require stronger evidence of both incompetence and crisis.

Temporary guardianship is also sometimes used when no one is willing to become a permanent guardian, yet a decision (e.g. on medical treatment) must be made. The theory is that volunteers are easier to find for the shorter period. Conservatorships may also be issued as temporary orders.

17. What is a limited guardianship?

The guardian's role would be restricted to certain types of decisions --e.g., medical only, or personal and not financial decisions. This is a new concept which has not been fully utilized yet in Massachusetts courts, but is an important way to tailor a guardianship to the special needs of the individual ward in the least restrictive way possible.

Another way in which guardianship may be limited is to ask the court to allow the ward to keep some money to spend as desired without guardian approval. This should be done if the ward can reasonably handle that money.

A guardianship may also be tailored by asking the court to require a special review every so often of whether the person still needs a guardian, and by the guardian agreeing to help dissolve the guardianship when appropriate. This would be particularly helpful for wards likely to improve in the near future.

18. How may conservatorship be limited?

The law allows for up to $300 per month to be exempt from the conservatorship and left to the ward to handle. While technically authorized only for mentally retarded people, this exemption could probably be requested for mentally ill people as well, as long as the ward could handle it responsibly.

19. How long does guardianship or conservatorship last?

A permanent guardianship or conservatorship lasts until (1) the ward dies or (2) the court orders the guardianship or conservatorship terminated due to the ward's improved judgement and capacity.

A temporary appointment lasts up to 90 days. Occasionally it can be renewed once. When a temporary appointment is ordered, permanent guardianship or conservatorship must also be requested; however, the request lapses automatically if no one takes certain further actions.

A guardianship can outlast a particular person as guardian if (1) the guardian dies; (2) the guardian voluntarily resigns; or (3) the guardian is removed by the court for failure to perform properly. If the guardian dies, the guardianship still continues, and someone should petition the court to fill the vacancy.

The same is true for conservators and conservatorships.

20. How much does it cost to get guardianship or conservatorship, and who pays?

It is impossible to give a definite cost; a rough approximation for an uncontested case might be two or three hundred dollars, paid by the ward. If the ward has no money, free legal services should be found. Call the Department of Mental Health Legal Office at 727-8611, or Mental Health Legal Advisors Committee at 723-2876. Sometimes the family will volunteer to pay, though not required to.

21. What is a bond?

The guardian or conservator must usually sign a pledge called a bond, as protection against misusing the ward's money. The bond must usually be backed up with what are known as "sureties", either "personal" (two individuals) or "corporate" (a bonding company) who can be made to pay if the guardian misuses the ward's money and is nowhere to be found. Occasionally the judge may allow the sureties to be omitted.

22. Can a guardian or conservator be held liable for anything?

Guardians and conservators are seldom held liable for anything but embezzlement or gross misconduct.

To avoid problems, the guardian/conservator should keep informed of the ward's needs, make decisions as needed, and act with care in the best interest of the ward. Guardians and conservators are not expected to financial wizards or medical experts, but reasonably responsible and intelligent adults.

In terms of whether a guardian could be held liable by a third party, the only cases the authors of this handbook are aware of concern situations where the guardians have had dealings with a third party on behalf of their ward and failed to say they were dealing as guardians.

Guardians whose wards do not live with them might send a letter to the ward's institution or residence requesting notification of periodic reviews and any unusual changes in health, behavior, living conditions, needs, transfers, and so forth. Guardians who go on long vacations or move should leave a forwarding address.

One of the most common mistakes guardians and conservators make is letting the ward's money accumulate without spending any of it even though the ward has current needs for it for clothing, housing, community placement, dental care, etc. This happens most often when the ward lives in an institution or nursing home. The guardian should respond quickly and actively to legitimate request for funds, and should take the initiative to regularly contact the institution or caretakers to see if the ward needs money for anything.

The second most frequent mistake guardians and conservators make is to divert the ward's money to someone else. The ward's money is for the ward's use, even if so disabled as to appear unable to appreciate it. The only exception would be for a portion of the estate to go to needy and dependent family members, and it would be extremely unwise to do this without explicit court approval. Obviously, the guardian or conservator should not be using the ward's funds for himself or mixing the ward's funds with the guardian's or conservator's own money. The only exception would be the small percentage the court may authorize as compensation for being guardian or conservator.

The guardian cannot be held responsible for the ward's debts and would not have to pay out of his/her own money, but the guardian would have to take any necessary legal action--paid for by the ward--to have the bills voided.

23. Can the guardian or conservator resign?

Yes, although the court would have to be assured that the resignation would not create a crisis for the ward. The court might ask the resigning person to help look for a replacement.

An appointment as a temporary guardian lapses automatically at the end of the temporary period unless someone acts to continue it.

24. Can guardianship or conservatorship be removed if the ward becomes more capable?

The judge would have to approve the removal. Guardianships and conservatorships for mentally retarded people are fairly hard to remove, as many courts are not aware of the beneficial effects of good education and environment on mental retardation.

The ward, or anyone on the ward's behalf, including the Department of Mental Health, may ask the court at any time to remove either the guardian or the guardianship. Contact the Mental Health Legal Advisors Committee for assistance.

25. How does one object to guardianship or conservatorship being obtained?

One must request that a court hearing be held at which objections may be heard. When guardianship is being obtained for purposes of admission to a mental health or retardation institution, the hearing will be scheduled and held automatically. Otherwise, someone must take the initiative to contact the court and request a hearing. For the mechanics of doing this, see Part III (C) below, page 27.

Exception: in emergencies, guardians may be appointed for a very short period of time without prior notice to the ward and without an opportunity to be heard.

The ward may object either to guardianship/conservatorship itself, or to the particular person being proposed as guardian/conservator.

The ward, or someone on his/her behalf, may also object after the appointment has taken place--again either to guardianship/conservatorship itself, or to the particular guardian or conservator. The guardian/conservator may not deprise the ward of the right to use the ward's funds to hire a lawyer for this.

For assistance, contact the Mental Health Legal Advisors Committee.

26. What can be done about a guardian or conservator who is not performing properly?

First, the guardian's shortcomings and duties should be explained. If this does not work, most Probate Courts have probation officers who might be asked to speak to the guardian or conservator. When the ward is an indigent resident of a mental health facility, contact the Mental Health Legal Advisors Committee.

Ultimately, one may either (1) go to court and ask for the guardian's removal; or (2) (more difficult) get a lawyer and sue the guardian or conservator.

One should carefully document the abuses that have occurred-- for example, the number of requests for money or a decision that have been ignored; evidence of misuse of the ward's funds such as using the funds for the guardian and not the ward, not paying the ward's bills, putting the ward's money in the conservator's personal bank account, etc.

27. Does being in an institution automatically mean a person can be put under guardianship or conservatorship?

Definitely not. Even institution residents are considered competent until proven otherwise.

28. Why are the staff at state institutions now telling many parents to get guardianship?

One reason is that in the yearly evaluations of institution residents, the staff must decide whether the resident appears to be legally competent; if not, the staff must take steps to have a guardian appointed.

Other reasons might be: a need for consent to surgery, a refusal to take medications or to eat, filing of a 3-day notice of intent to leave the hospital, transfer to a community residence, rash expenditures of money, pregnancy, or other situations in which the staff feel the mentally disabled person is not competent to make decisions.

One should make sure the institution is not asking for guardianship just to avoid responsibility for difficult decisions.

29. Are people who have lived in state institutions since childhood considered wards of the state? Is the state their guardian?

The only way the state of Massachusetts becomes a legal guardian is through a special court procedure (a "care and protection" proceeding) when the parents cannot take care of a child under age 18 and the Department of Public Welfare is named guardian. This type of guardianship almost always expires at age 18. *

Being in a state institution has no effect one way or the other on the state's being the guardian or not. The state institution is however, responsible for its patients and residents, much as an elementary school is responsible for its students during school hours. But the institution does not have the legal authority to make decisions or to sign consent forms and the like for its residents.

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* In very rare cases, a mentally retarded child who is judged legally incompetent by a court and whose guardian is already the Department of Public Welfare (DPW) might continue to have DPW as a guardian past the age of 18. Contact the DPW for information on such a client's status. This is not a common practice. (Mass. General Laws, Chapter 119, Section 23C).

30. How does one get a clinical team report?

Clinical team reports, of course, are needed only in guardianships based on retardation. If the person is in an institution, the head of the institution should be contacted for a report. Otherwise, one must find the three professionals on one's own--for example, a family physician, staff at local mental health center, the local Department of Mental Health area office. The signers must have examined the person within 180 days of filing for guardianship.

For guardianships based on mental illness just the physician's report of an examination within 30 days is needed.

31. How can one find out if someone is under guardianship or conservatorship already?

Check the probate court records in the county where the person lived when guardianship or conservatorship might have been obtained. These records are open to the public.

32. What is a guardian ad litem?

A guardian ad litem is completely different from a guardian. A guardian ad litem is a lawyer appointed by the court to present the point of view of an incompetent person in a specific legal case; he or she does not have power to make decisions for the person, handle financial affairs, or the like. Once the legal case is over, the guardian ad litem's duties cease.

33. Isn't the legal term "incompetent" used for other situations besides guardianship?

Yes. There are several non-interchangeable uses of the term.

(1) A person charged with a crime may be found "incompetent to stand trial" by reason of mental illness or retardation, but would not automatically be assigned a guardian or declared incompetent to manage his affairs. Conversely, a person under guardianship would not necessarily be declared incompetent to stand trial. These are two separate issues.

(2) Proving "incompetence in fact" is a form of protection for a person who is not under guardianship but who has made a contractual agreement* without having the mental capacity to have understood it. If judged "incompetent in fact", the person cannot be held accountable for his or her end of the agreement unless the agreement was for "necessaries" such as food which the guardian was not providing. Being judged "incompetent in fact" refers to that one instance only, and does not mean the person automatically gets put under guardianship.

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* The contractual agreement can be either formal (a signed contract) or informal (paying a certain amount of money to get certain goods or services, such as a haircut).

(3) "Incompetent" in the sense of needing a guardian or conservator is a judgment that can be made only by a court in a special process. Being institutionalized does not automatically mean a person is "incompetent".

34. Can a parent name someone as guardian for a child in a will?

Not exactly. If the child is over 18, only a court can appoint his or her guardian. However, the parent may state perferences. Courts will usually heed these wishes if reasonable. One could also consider naming a trustee and setting up a trust instead (see page 5).*

35. What can staff of mental health or retardation programs do if they feel a guardianship is being sought for the wrong reasons or by an inappropriate person?

First, try to explain the proper use of guardianship. Next, if asked to evaluate a client for competence, state the problem candidly on the report form. If guardianship is not needed, or the candidate is inappropriate, say so. Finally, contact a lawyer for the potential ward (call Mental Health Legal Advisors for assistance).

36. Can guardians authorize sterilization?

According to a 1977 state law,* physicians can be fined or imprisoned if they do a non-emergency sterilization without the informed written consent of the person involved. It would be very risky for a doctor to take a guardian's or parent's signature instead. Therefore, in all probability, guardians do not have the authority to consent to sterilizations and in any case should never try to do so without court approval. In another state, a judge who authorized a sterilization without a law specifically permitting him to do so is now being sued, and a similar situation could result in Massachusetts.

37. Where can I get further help with guardianship?

See the resource list, page 34 of this handbook.

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* Mass. General Laws, Chapter 112, Section 12W.

PART III:
MORE TECHNICAL INFORMATION ON GUARDIANSHIP

This section adds detail to three problem areas: A) finding a guardian when no relatives are available and a guardian is desperately needed; B) what information an institution social worker should have when asking the Department of Mental Health Legal Office for a lawyer to get a guardianship; and C) preventing inappropriate guardianships or appointment of unsuitable people as guardians.

A. FINDING A GUARDIAN

When there are no relatives or friends available to become a guardian for someone who urgently needs a decision-maker, there is no easy answer. Generally one hunts around for a friend, a former staff member who had taken a special interest in the patient or client, a voluntary agency (church group, senior volunteers, etc.). Some of the Associations for Retarded Citizens have become "corporate guardians" ; contact your local ARC or the Massachusetts Association for Retarded Citizens for information.

If the ward has a lot of money, a guardian can be hired. Often a lawyer or other professional does this. The court can authorize payment out of the ward's funds.

Sometimes a volunteer can be recruited more easily to do a temporary guardianship or a limited guardianship.

Employees of the caretaking institution should not become guardians of their patients, since they would have a conflict of interest if the institution in any way harms their ward.

B. INFORMATION FOR SOCIAL WORKERS TO GIVE THE DMH ATTORNEY

If a mentally disabled person is in need of guardianship, is in a Department of Mental Health facility, and is indigent, the Department of Mental Health Legal Office (617/727-8611) may be asked to provide the legal services necessary to get the guardianship. Non-emergency situations will receive low priority and if the family is not indigent, the Legal Office may not be able to provide services. To make their work more efficient, they ask the following:

1. Do not request their services if the person has more than $1,000 in his/her account. This money could legitimately go to pay for the services of a private lawyer.

2. Wherever possible allow 2-4 weeks lead time. In emergencies, however, their services can be available very quickly.

3. Have the following information ready, at least verbally if not in writing:

   (1) Patient's name and age
   (2) Names and last known addresses of any relatives
   (3) Documentation of efforts to contact the relatives concerning the intent to secure a guardian. Since potential heirs must by law be given an opportunity to object to guardianship, someone must assure that they have been notified. If no relatives are known, get some documentation of that fact--such as, no letters or visits for the past 20 years, knowledge that parents have died and patient has no siblings, etc.

   If any relatives are living but do not appear to be interested, get documentation of efforts to notify them--send notice by registered mail and keep the receipt.

   If relatives may be living but cannot be located, send a letter to the last known address and keep the returned envelope with the post office's stamp, "Addressee Unknown".

   (4) Amount of money in patient's account.

   (5) Amount of monthly income--wages, SSI, etc.

   (6) Name and address and relationship of potential guardian or conservator.

   (7) Description of why guardian or conservator is needed; if requesting on an emergency basis, why it is an emergency.

4. The Legal Office does not have a pool of potential guardians available to be appointed when the ward has no family, and cannot provide any guardians, except under the most dire circumstances of grave harm to the ward if a guardian is not found immediately.

C. PREVENTING INAPPROPRIATE GUARDIANSHIPS AND GUARDIANS

Dealing with inappropriate or unwanted guardianships almost always requires a lawyer, whom the client must find himself, with one exception. As of December 29, 1977, a new law called "Chapter 567"*states that when a guardianship is being sought for purposes of authorizing admission to an institution, a hearing must be held on the issue of admission and the ward must be given a free lawyer if unable to pay a private lawyer. The ward must be present at the hearing except under extraordinary circumstances.

In all other instances of guardianship, the client must find and pay for his own lawyer or get one from legal aid or the Mental Health Legal Advisors.

The ward may also represent himself alone in court, but it is not easy to be successful without a lawyer.

1. How to request a lawyer under Chapter 567

If the guardianship has been obtained or is being sought for purposes of admission to an institution, or if the ward is presently in an institution by order of the guardian, then the ward (if objecting to guardianship) should write a letter to the court requesting a lawyer be appointed under Chapter 567 and that a hearing be scheduled.

If the ward was admitted after December 29, 1977, then it is certain he/she has a right to a lawyer. If admitted before that date, the issue is not clear yet. Writing a letter of request to the court is probably worth a try.

A sample letter is included below. One should write to the probate court named in the upper left hand corner of the forms the ward may have received about the guardianship. This should be the probate court in the county where the ward lived at the time guardianship was sought. A list of court addresses is found on page 35.

Because this procedure is new, it is not fully "automatic" yet; however, in the future, the courts should be appointing attorneys automatically for indigent people whenever guardianship is being sought for purposes of admission, and the letter of request will be unnecessary.

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* Chapter 567 of the Acts of 1977, amending Mass. General Laws, Chapter 201.

SAMPLE LETTER:

Your present address
Date

Register
_____ County Probate Court
Address

Dear Sir:

I am indigent and I request the appointment of an attorney for myself under Chapter 567 of the Acts of 1977 for purposes of objecting to appointment of a temporary and/or permanent guardian and to the use of this guardian's authority to admit me to an institution for the care and treatment of mental illness or mental retardation. Please consider this letter as a prc se appearance until an attorney is appointed for me. My telephone number is _____ .

Sincerely yours,

_____
(Your full legal name,
printed, and your signature)

2. What to do in guardianships not covered by Chapter 567.

The ward, or someone on his/her behalf, is responsible for letting the court know he/she objects to guardianship and getting a lawyer and having a hearing scheduled. The same procedures would apply to conservatorship. The following information is important to know.

3. Notice of Impending Guardianship

By law, guardianship does not happen without warning, except in cases the court considers "emergencies." The following people must be officially notified when guardianship is being sought:

1) potential ward
2) heirs (nearest living relatives), including spouse if any
3) Department of Mental Health
4) Veterans Bureau (if person is entitled to Veterans' benefits)

The notice will be mailed or hand-delivered and looks something like this:

[A.C. 17.2A]

[Notice to the Veterans' Administration is not required unless the ward has some interest thereunder.]

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. PROBATE COURT. CASE No.....

To .....

of .....*in said County of Suffolk, and to h wife-husband, heirs apparent or presumptive and to the Massachusetts Department of Mental Health, and to the United States Veterans' Administration.*

A petition has been presented to said Court alleging that said .....

.....

is a mentally ill person and praying that .....

of ..... in the County of .....

or some other suitable person be appointed h guardian.

If you desire to object thereto you or your attorney should file a written appearance in said Court at Boston before ten o'clock in the forenoon on the .....

day of .....19 , the return day of this citation.

Witness, MARY C. FITZPATRICK, Esquire, First Judge of said Court, this .....

.....day of .....19 .

JAMES W. HENNIGAN, JR., *Register.*

Sample

THE MOST IMPORTANT PART IS THE RETURN DAY, near the bottom. This is the deadline for telling the court someone objects. If no one objects by that deadline then in most courts, and in most cases, the judge will go ahead and issue the guardianship. The ward will not have had a chance to present his/her side of the story and probably no one will ask for it.

The return day for a temporary guardianship will usually be three days from receiving notice. The return day for a permanent guardianship will be at least 14 days from receiving notice.

In emergencies a temporary guardianship can be ordered without having given notice. The ward would have to be notified within 24 hours afterwards that a guardian has been appointed and that he/she has a right to object by giving two full days' notice to the court and the other side, and then going into court.

Confusion sometimes results from the fact that when a temporary guardianship is requested a permanent guardianship must also be filed for, and hence the potential ward will receive two different notices and two different return dates.

4. Filing an Appearance

The most effective way to fight a guardianship is usually to get a lawyer, who will file the proper forms and go to court. However, the potential ward may represent him/herself if desired.

The first step is to "file an appearance", which means to let the court know officially that the potential ward objects. If the ward does not have a lawyer, he can file an appearance by writing a letter to the court, as follows:

Your present address
Date

Register
_____ County Probate Court
Address

Dear Sir:

I wish to file an appearance on my behalf to protest the appointment of a temporary and/or permanent [guardian] [conservator] for myself. My telephone number is _____ .

Sincerely yours,

_____
(Your full legal name, printed, and your signature.

The names and addresses of the probate court are listed at the end of this handbook. The name of the court will be given at the upper left corner of the court forms. If both permanent and temporary guardianships are being sought, one should object to both. The ward may also use this process to object to the person who is being proposed as guardian, even though the guardianship might be acceptable to the ward.

It is extremely important to file an objection before the return date. It is harder to win a case by objecting after the return date.

5. Finding Out If Notice Has Been Given

Staff at institutions or mental health or retardation programs may be very concerned that a resident or patient is being put under guardianship inappropriately. It takes some effort to be aware of whether guardianship is being pursued, since staff are not automatically notified. The requirement to notify the Department of Mental Health is usually accomplished by notifying the Division of Settlement and Support within DMH (telephone 617/727-5634), which rarely identifies what program or facility the person is in. Other than calling that office, here are some ways to find out:

1) Notice if the resident receives a letter from the court (of course, the resident does not have to tell staff about the letter, and staff do not have the right to open a resident's mail without permission or monitor contact with a resident's lawyer)

2) See if anyone has contacted the institution or program to get a clinical team report or physician's certificate or to see the client's records

3) Check the local probate court records, which are open to the public

4) Watch the local newspaper column of legal notices; notice is sometimes given there if there is no known address for the relatives. Again in emergencies guardianships can be ordered for a very short period of time without prior notice.

6. Scheduling the Hearing

When the court receives the appearance form or letter, a hearing will be scheduled if anybody requests it, and everyone notified at least seven days in advance as to time and place. Some courts are so backlogged that hearings take several months to schedule. In the meantime unless a temporary guardian was appointed on an emergency basis without notice, the person is not under guardianship, and no guardianship can result without a hearing.

Again if no one has requested a hearing by writing a letter or filing an appearance, and if the guardianship does not concern admission to an institution, then no hearing will be held and guardianship will almost always be issued automatically.

7. Preparing for the Hearing

The potential ward is usually much better off to have a lawyer. With or without a lawyer, the general steps are:

(1) Gather facts about the potential ward to show ability to make informed decisions.

For a retarded person, this might mean:

--Indication of adequate intellectual functioning
--Training programs taken in money management, basic living skills, sex education
--Special activities showing ability to make decisions
--Employment history, especially if it shows stability or ability to earn a living
--Ability to communicate; preferably reading and writing though though not essential
--Indications of willingness to seek guidance on decisions; names of people willing to give guidance
--Estimate of potential for growth, given more education

For an allegedly mentally ill person, this might mean:

--Signs of progress in treatment program--off-grounds passes, privileges, unlocked ward, decrease in amount of supervision, preparation for discharge or less restrictive environment, participation in work or training programs
--Employment history, especially if recent and stable
--Level of education, especially if high school or better
--Support systems in the environment the person will be living in--job, school, supportive family, friends who have expressed interest, out-patient treatment program

It will be crucial to have an expert to testify in favor of the potential ward; usually a doctor is best for this although a social worker or psychologist can be helpful too. The doctor should examine the potential ward and form an opinion of his or her ability to manage personal and financial affairs.

(2) Gather facts about the potential guardian, for example:

--Signs of lack of concern for the ward--few visits, refusal to participate in annual reviews or Chapter 766 plans, etc.
--Inadequate year-round availability
--Conflicts of interest--e.g. husband suing wife for divorce while trying to become guardian
--Documented hostility or abusiveness towards the potential ward
--History of financial abuse of potential ward
--Name of more appropriate person willing to become guardian

(3) If guardianship looks likely, be prepared to suggest a less restrictive alternative instead.

8. The Hearing

The hearing will be in a courtroom, usually with a judge and no jury. The attorney will advise as to whether the potential ward should attend or speak. If the ward does not have an attorney, and wishes to object, he or she should definitely attend and be prepared with the information suggested above. It helps to be neatly dressed. The judge will take evidence first from the guardian's side, which will include testimony from a doctor usually, then from the potential ward. The judge may ask questions about how the potential ward intends to make a living, get psychiatric treatment (if that is an issue), find a place to live, why guardianship should not be issued, and so forth. Usually the judge will make a decision by the end of the hearing.

If the ward does not have a lawyer, and wants to represent himself, he should call the Mental Health Legal Advisors for assistance in doing so. It is not easy, but is probably better than nothing. The chance of success is usually greater with a lawyer, but since Massachusetts does not provide free lawyers in all instances to fight guardianships, some citizens may be able to exercise their right to a hearing only by acting as their own advocate.

9. Right to Appeal

Probate court decisions on guardianship and conservatorship can be appealed in Appeals Court or the Massachusetts Supreme Judicial Court. It is almost impossible to appeal successfully without having a lawyer from the very beginning.

10. Paving the way for removing guardianship in the future when no longer needed

When guardianship is being obtained for a person whose disability may decrease over time, the ward should get a lawyer, perhaps not so much to fight the guardianship now as to make future removal or reduction of the guardian's powers easier. The ward's lawyer and the guardian's lawyer can make a written agreement, incorporated into the guardianship decree, that the need for guardianship will be reviewed every so often and that if the ward's needs change, the guardian will go back to court and ask for removal or a limiting of his/her powers.

For sample agreements and further information, contact the Mental Health Legal Advisors Committee.

RESOURCE LIST:
WHERE TO GO FOR FURTHER ASSISTANCE

Massachusetts Association for Retarded Citizens

381 Elliot St., Newton, MA 965-5320

Many of MARC's members and staff have been through these decisions themselves, as parents or relatives of retarded people, and are willing to discuss pros and cos of guardianship and other alternatives. MARC also has referral lists of services for mentally retarded people.

Massachusetts Association for Mental Health

14 Somerset St., Boston, MA 742-7452

Organization of citizens actively concerned with mental health care issues.

Mental Health Legal Advisors Committee

73 Tremont St., Boston, MA 02108 723-2876

Advocacy agency for indigent residents in mental health and retardation facilities in Massachusetts. Independent of the Department of Mental Health. Provides advice and legal services on behalf of the resident.

Department of Mental Health, Legal Office

190 Portland St., Boston, MA 727-8611

This is the main provider of free legal services necessary to obtain guardianship and conservatorship; these services are available only to indigent people under the care of the Department of Mental Health. This office is also the appropriate source of advice on questions of DMH staff responsibilities in guardianship matters.

Massachusetts Bar Association

1 Center Plaza, Boston, MA 523-0595

This office has a referral service which can provide names of private lawyers to contact. Ask for one who is experienced in mental disabilities law. The Massachusetts Bar Association is also beginning a referral service for names of lawyers who will take cases on a no-fee or low-fee basis, but only in a limited number of cases and only for people who really cannot get legal services elsewhere.

MASSACHUSETTS PROBATE COURTS

Barnstable County Probate Court
Main St., Barnstable 02630
617/362-2511, Ext. 211

Berkshire County Probate Court
76 East St., Pittsfield 01201
413/442-6941

Bristol County Probate Court
11 Court St., Taunton 02780
617/824-4004

Dukes County Probate Court
Edgartown 02539
617/627-4703

Essex County Probate Court
32 Federal St., Salem 01970
617/744-1240

Franklin County Probate Court
Courthouse, Main St., Greenfield 01301
413/774-4969

Hampden County Probate Court
50 State St., Springfield 01103
413/781-8100

Hampshire County Probate Court
Merrick Lane, Northampton 01060
413/584-7494

Middlesex County Probate Court
Cambridge St., East Cambridge 02141
617/494-4545

Nantucket County Probate Court
Broad St., P. O. Box 1145, Nantucket 02554
617/228-2669

Norfolk County Probate Court
649 High St., Dedham 02026
617/326-7200

Plymouth County Probate Court
N. Russell St., Plymouth 02360
617/746-0550

Suffolk County Probate Court
Old Courthouse, Pemberton Sq.,
Boston 02108
617/725-8000

Worcester County Probate Court
Court House, Worcester 01608
617/756-2441, Ext. 216